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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 467

BECKLEY NEWSPAPER CORPORATION,
PETITIONER

VS.

C. HAROLD HANKS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION

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September 16, 1967

Mullens Advocate Print — Mullens, W. Va.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Statement	2
I - With Reference To The Evidence	2
II - With Reference To Jury Charge	4
Argument	8
I - The Evidence is Constitutionally Sufficient To Support The Verdict	8
II - The Decision of The Trial Court is Clearly Correct	10
III - The Judgment of The State Court Does Not Establish Any Precedent To Depart From Doctrine of New York Times versus Sullivan or Subsequent Pertinent Decisions	12
IV - To Sustain The State Court Judgment In This Case Will Not Deny Petitioner Its Duty or Privilege of Criticizing Other Public Officials or Acts	13
Conclusion	14

CITATIONS

CASES:	Page
Foard v Harwood, 113 W.Va. 619, 169 S. E. 465	12
Mills v Inter-Ocean Casualty Co., 127 W.Va. 400, 33 S. E. (2d) 90	12
In re Nat. Bank of West Virginia, 137 W.Va. 673, 73 S. E. (2d) 655	13
Nesbitt v Flaccus, 149 W.Va. 65, 138 S. E. (2d) 859	12
New York Times v Sullivan, 376 U. S. 254, (1964)	3, 4, 8, 10
Palmer v Hoffman, 63 S. Ct. 477, 318 U. S. 109, 87 L. Ed. 645	12
Poe v Pittman, (W.Va.) 144 S. E. (2d) 671	12
Rosenblatt v Baer, 383 U. S. 75 (1966)	8
Slaughter v Valleydale Packers, Inc., 198 Va. 339, 94 S. E. (2d) 260	12
TEXTS:	
33 *Am. Jur.* 39, 92	10
33 *Am. Jur.* 113, Sec. 111	11
Restatement of the Law, Torts, Vol. 3, p. 165, Sec. 569	10
Restatement of the Law, Torts, Vol. 3, p. 308, Sec. 617	10
RULES:	
Rule 51, *West Virginia Rules of Civil Procedure*	5, 11, 12

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OPINIONS BELOW

The Circuit Court did not write an opinion or assign any reasons in its final judgment order. The Supreme Court of Appeals of West Virginia denied three petitions seeking an appeal from that order but did not write any opinion or assign any reason for the refusals.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The questions presented in the Petition are adequate to present the issues except that it should be noted that they are grounded upon two incorrect assumptions of fact, one, that there is no evidence in the record of malice "as defined by this Court," and two, that the state court's instruction referred to was substantially different upon the elements of malice from three instructions offered by Petitioner and given by the same court.

CONSTITUTIONAL PROVISIONS INVOLVED

These are stated in the Petition.

STATEMENT

The "Statement of The Case" in the Petition, page 3-10, omits pertinent facts and contains erroneous factual conclusions pertinent hereto.

I - With Reference To The Evidence

Respondent Harold Hanks, is a resident of Raleigh County, West Virginia who was first elected as Circuit Clerk in 1956 for a six year term. He ran for re-election in 1962. (Tr. 12). Beginning in 1960 (when he was not up for re-election) the petitioner's Emile Hodel, editor of the Beckley Post-Herald, who lived in the same general neighborhood as Hanks began a series of attacks upon respondent, some upon him in his public capacity, and some upon him personally.

The Beckley Newspaper Corporation is a Hodel family concern, publishing a morning paper, which is Republican, and an afternoon paper, which is Democratic. Emile Hodel was and is the editor of the morning paper and wrote a personal column as well as editorials. The papers circulate in a multi-county area, the morning paper having a circulation of 20,000. (Tr. 89, 103-105). Although the petitioner is a corporation the offending libel was written entirely by Emile Hodel against his neighbor known to him, and published from

a plant located within two blocks of a county court house, where respondent had his office.

After the 1962 re-election of Hanks, in February 1963, when the West Virginia statute of limitations had run against some of the offending writings of Emile Hodel, and *before* the decision in *New York Times v Sullivan,* 376 U. S. 254, (1964), respondent filed his complaint herein alleging libel of respondent as an individual person and also as a public official. An amended complaint filed two months after the decision in that case added a count based on the West Virginia statute of insulting words. The case was tried May 31, 1966. The issue of insulting words was abandoned and not submitted to the jury. (Tr. 3, 4).

Petitioner's motion for judgment on the pleadings did not assign the ground he urges in his Petition, nor did Petitioner assign such ground for his motion for summary judgment, filed in 1965 (R. 27) nor at trial time (Tr. 9).

Petitioner charges in his Petition (p. 8) the trial record "does not contain a scintilla of evidence that petitioner's editorials were written with actual malice as defined by the Court." Upon the contrary the record provides convincing proof of reckless disregard upon the part of Emile Hodel of the truth or falsity of the offending charges, as well as proof of personal hatred, spite and revengeful motives.

In a small community such as Beckley, West Virginia, there was ample opportunity for Emile Hodel or any officer, reporter, or representative of petitioner to acquire information about any of the libellous charges relied upon to determine truth or falsity thereof. The evidence discloses neither Emile Hodel nor any representative sought any information of respondent (Tr. 56-59) or of Mrs. Hurt (108-109). *Emile Hodel was not called as a witness in behalf of Petitioner, was not in the court room, and no request made for a continuance because of his absence.* Petitioner called as a wit-

ness the general business manager,—not the writer or editor—who admitted the offending editorials were written by Emile Hodel and not checked by anyone else (Tr. 106) and that Petitioner had no witness to any prior investigation of the charges (Tr. 108, 109, 120, 121) that at best they were based upon a "feeling" of "possibility" they might be true. (Tr. 121).

In addition to proof of "malice" within the definition of *New York Times v Sullivan*, 376 U. S. 254—publication of false libellous matter about a public official with disregard of whether or not it was true or false, the evidence also established personal spite, hatred, corrupt motive and desire on the part of Emile Hodel, individually (using petitioner corporation as his cloak and tool) to injure his neighbor, Harold Hanks. Beginning at least in 1960 with an editorial starting on page 1, entitled "On Harold's Hankerings." (Appendix D, Petition, p. 11a), Emile began a campaign of using his newspaper to attack and smear the person of Harold Hanks. He followed with another in 1961 (Appendix D, Petition 14a). The trial court permitted introduction to show the "state of mind" of Emile Hodel when he composed the articles relied upon. (Tr. 28). The subsequent intemperate personal attacks with reference to Hank's person and personal habits reveal the underlying ill-will and manifest intention to injure Hanks personally.

II - With Reference To The Charge To The Jury

Petitioner complains of the giving of Respondent's Plaintiff's Instruction No. 3, Tr. 133-134) with reference to inclusion of the emphasized words:

> "However, even if the words complained of are libellous per se, and are false, before a plaintiff can recover you must believe from the evidence that they were published with malice —and in this case, malice means that the publisher knew them to be false or used them with

reckless disregard of whether they were true or false, *or used them with bad or corrupt motive.*

Applying these principles more clearly to this case, you, the jury, are hereby instructed that the language complained of by the plaintiff, Harold Hanks, is libellous per se; that it was used by the Beckley Newspaper Corporation upon a public occasion in commenting upon matters of public interest and that this was a privileged occasion; that nevertheless the plaintiff, Hanks, is entitled to recover damages from the defendant herein and you should find your verdict for him, if you believe from the evidence that the charges or statements complained of were false and that the publisher at the time knew they were false or published them with reckless disregard of whether they were true or false *or published them with hatred, or revenge, or from personal spite, ill will or a desire to injure plaintiff.* And if you the jury so believe it is no defense that they were published in an election year or in an election campaign or that the plaintiff was a public official.". (Emphasis ours).

Specific objection was not made to the emphasized words by Petitioner's attorneys prior to submission to the jury (Tr. 130-31) in accordance with requirements of *Rule* 51, *West Virginia Rules of Civil Procedure.*

And Petitioner offered the following instructions which were given to the jury as part of the same charge.

"Defendant's Instruction No. 2.

The Court instructs the jury that you cannot return a verdict in favor of the plaintiff, Harold Hanks, unless the plaintiff proves by a preponderance of the evidence (1) that the editorials or material parts thereof were false,

(2) that the defendant, Beckley Newspapers Corporation, knew they were false, (3) that they were published by the Newspaper with actual malice toward the plaintiff. The rule of law requiring the plaintiff to prove all three of these things is not a mere makeshift to be disregarded by you at your pleasure, but it is a substantial and existing part of the law of the land and must be given consideration by you in arriving at your verdict.

The mere fact that this plaintiff filed this suit against the defendant is no proof that any part of the editorials was false, or that the defendant knew it was false or that the defendant was guilty of actual malice. There is no presumption that the plaintiff is entitled to recover damages merely because it commenced this suit and that it has been tried before you. Therefore, unless you believe from a preponderance of the evidence that the editorials or material parts thereof were false, that defendant knew they were false *and* that defendant acted with actual malice *or* with reckless disregard of the truth and consequences, then you should find your verdict in favor of the defendant, Beckley Newspapers Corporation." (Emphasis ours).

"Defendant's Instruction No. 6

The Court instructs the jury that at the time of the publication the plaintiff was a public official and a candidate to succeed himself as Clerk of the Circuit Court of Raleigh County and that the public has a paramount interest in the free flow of information to the public concerning public officials who are the servants of the public. This and anything that related to the plaintiff's fitness for public office was a proper subject for discussion and com-

ment in the editorials complained of. Therefore, the Court instructs the jury that if you believe from the evidence that the subject matter of the language complained of related to the character and attributes of the plaintiff, Harold Hanks, touching his fitness for public office, and if you further believe that such statements and comment were honestly made without actual malice *and* without reckless disregard of their truth or consequences, then it is your duty to return your verdict in favor of the defendant, Beckley Newspapers Corporation." (Emphasis ours).

"Defendant's Instruction No. 11

The court instructs the jury that in this case the plaintiff was a public official and was a candidate for public office. Therefore, he cannot recover damages merely because some part or parts of the editorials may have been false, he must go beyond that and prove that the defendant knew that the editorials or a material part thereof was false *and* that the defendant published these editorials with actual malice *or* with a reckless disregard for the truth or consequences thereof; and unless you believe by a preponderance of the evidence that all of these things have been proved, then you may return your verdict in favor of the defendant, Beckley Newspapers Corporation." (Emphasis ours).

These three instructions separated "actual malice" from knowledge of falsity and reckless disregard of the truth or consequences and it ("actual malice") necessarily had to be equated with hatred, ill-will, revenge, corrupt motive or intent to injure. They represent a concurrence in submitting the two types of malice to the jury. Petitioner now complains of an alternative which

it offered the same jury in above instructions given by the same trial court.

ARGUMENT

This case was tried upon the theory that Petitioner's libellous statements pertained to Respondent in two categories (1) as a private person, and (2) as a public official in performance of his public duties or his activities which had some relation thereto; that the offending writing was that of Emile Hodel who took advantage of his position as an editor to discharge his personal malice toward Respondent through Respondent's newspaper and to intermingle it and disguise it—in reference to Respondent as a public official. But regardless of whether or not the combination of these two approaches may be correct it is submitted that (1) the evidence is constitutionally sufficient to support the trial court's judgment, (2) the decision of the trial court is clearly correct, (3) the trial court's judgment does not establish any precedent that any West Virginia state court is about to, or is likely to, depart from the doctrine of *New York Times v Sullivan,* 376 U. S. 254, or *Rosenblatt v Baer,* 383 U. S. 75, or other subsequent applications of the rule; and (4) the verdict is not excessive to the point of discouraging a free press in the area, or restricting Petitioner from its duty or privilege to criticize public officials.

I

THE EVIDENCE IS CONSTITUTIONALLY SUFFICIENT TO SUPPORT THE VERDICT

Strict application of the doctrine of *New York Times v Sullivan,* 376 U. S. 254 confines the inquiry here to: (1) Did Emile Hodel or some other responsible officer of Petitioner corporation publish the offending words knowing them to be false at the time? or (2) Were they published with reckless disregard of the truth or falsity thereof?

The test may be reduced to consideration of one

charge, to-wit, that respondent had intimidated or threatened another public official in performance of her duty (R. 3). That this was false was clearly shown by the evidence of Respondent and that other official (Tr. 46, 47, 56, 57). There was no contrary evidence whatsoever. There was no inquiry, no investigation, no attempt on part of petitioner to ascertain any facts with reference thereto (Tr. 57-59, 108, 109, 120, 121). No evidence to the contrary was ever offered. Emile Hodel did not testify—though he was editor, writer, neighbor, and the only person who could furnish any adverse evidence. Upon cross-examination of one George Hodel, a business manager of Petitioner who was not responsible for the offending editorials (Tr. 89, 106), he was asked "Those editorials were not written by anybody who wanted to find out whether or not he (referring to respondent) threatened Mrs. Hurt, were they?" To this the witness answered "There was cause on their part to feel there was that *possibility*." (Emphasis ours). (Tr. 121). This is the high water mark of Petitioner's responsibility to the public. The "cause" was never explained or developed. The record stands that Emile Hodel *felt* that there might be a *possibility* that Respondent threatened or intimidated another official, and upon that basis Petitioner hurled libellous statements and implications against Respondent to its readers. What better proof of reckless disregard of the truth or falsity of an accusation? This is not a case of mere negligence, such as overlooking information in a newspaper file or morgue; it does not involve a long distance appraisement of many news stories carried in nationwide dailies or by the wires of the press associations—such as in the *New York Times* case. Here two men confronted each other in a relatively small community and one used his newspaper recklessly to make false accusations against the other. All of the remainder of the trial evidence as well as failure of Petitioner to provide any proof other than a general statement of general policy emphasizes that the opinion or factual statement involved was not made in good faith. Regardless of the court's charge which will

be hereafter discussed the evidence was constitutionally sufficient both within the scope of *New York Times v Sullivan,* 376 U. S. 254 and by comparison with or contrast to the facts of that case.

II

THE DECISION OF THE TRIAL COURT IS CLEARLY CORRECT

1. Review of the record will disclose a personal feud or antagonism in a relatively small community in which one antagonist takes advantage of the fact that he is an editor to make false accusations about another who is a public official, and to tie onto the comments, whether fair or unfair, about public matters, attacks upon Respondent's personal habits of cleanliness, etc.

2. The words complained of, including those concerning Respondent as a public official and as a private person, were libellous, per se. *Re-statement of the Law, Torts,* Vol. 3, p. 165, Sec. 569; 33 *Am. Jur.* 39, 92.

3. The offending charges were proved false to the satisfaction of the jury whose province it was to pass upon this issue. *Re-statement of the Law, Torts,* Vol. 3, p. 308, Sec. 617. And the evidence was adequate to sustain such jury finding. (Tr. 46, 47, 56, 57).

4. Petitioner complains that the trial court's charge to the jury included Plaintiff's Instruction No. 3 (Tr. 133) and that this was a violation of Petitioner's constitutional right because in addition to defining malice as (a) publishing of calculated falsehood, or (b) reckless disregard of the truth or falsity thereof, said Instruction No. 3 contained, in the alternative, the words "or used them with bad or corrupt motive" and "or published them with hatred, or revenge, or from personal spite, ill will or a desire to injure plaintiff." (Tr. 133). These words of course are descriptive of malice in fact—in its usual everyday connotation—*actual malice*—in fact. There are also still acceptable definitions of actual mal-

ice in law in cases involving suit by a private person against another, including a person hiding behind the office of editor of a newspaper, and a newspaper corporation itself. 33 *Am. Jur.* 113, Sec. 111. It is only in recent cases involving criticism of public officials or those in the vortex of public discussion that "actual malice" in law has been shrunk to requirements of (a) calculated falsehood or (b) reckless disregard of truth or falsity.

Plaintiff's Instruction No. 3 was obviously so worded because of the two-fold approach of alleged libel of the Respondent as a public official *and* as a private person. If this was an improperly combined approach, or if one who is public officer cannot escape that capacity regardless of the nature of the libellous words used, nevertheless the jury verdict and trial court's judgment thereon was clearly correct for the following reasons: *First,* when Plaintiff's Instruction No. 3 was offered Petitioner did not object specifically to the inclusion of the emphasized words, and the general objections used must be greatly strained to establish such objection by implication, particularly in the light of the instructions offered by Petitioner which were given by the court, namely, Defendant's Instructions Nos. 2, 6, and 11. *Second,* said Defendant's Instructions Nos. 2, 6, and 11, in addition to defining the required malice as (a) calculated falsehood or (b) reckless disregard of truth or falsity, added the *alternative* of "actual malice"—which the court and jury could well and reasonably accept as the same alternative as set forth in Plaintiff's Instruction No. 3.

Petitioner made three unsuccessful attempts to obtain an appeal from the West Virginia Supreme Court of Appeals. *West Virginia Rules of Civil Procedure Rule* 51 reads in part:

> "No party may assign as error the giving or the refusal to give an instruction unless he objects thereto before the arguments to the jury are begun, stating distinctly, as to any given

instruction, the matter to which he objects and the grounds of his objection . . . . . ."

The failure to follow this *Rule* 51, or the procedure embodied therein, has been held to deny consideration of the alleged point of error, upon appeal. *Nesbitt v Flaccus*, 149 W. Va. 65, 138 S. E. (2d) 859; *Poe v Pittman*, (W. Va.) 144 S. E. (2d) 671; *Mills v Inter-Ocean Casualty Co.*, 127 W. Va. 400, 33 S. E. (2d) 90; See also: *Palmer v Hoffman*, 63 S. Ct. 477, 318 U. S. 109, 87 L. Ed. 645.

Furthermore since Petitioner invited the jury to consider the same alternative by using the words "actual malice" in context of its Instructions Nos. 2, 6 and 11, as the equivalent of bad or corrupt motive, hatred or personal spite, Petitioner cannot now be heard to complain that the jury was misled to its prejudice because Respondent's Instruction No. 3 spelt out such alternative "actual malice" in the definitive words of actual common everyday concept, and as heretofore set forth in the legal concept, thereof. *Slaughter v Valleydale Packers, Inc.*, 198 Va. 339, 94 S. E. (2d) 260. Errors induced by both parties cannot be relied upon by either in the appellate court. *Foard v Harwood*, 113 W. Va. 619, 169 S. E. 465.

III

THE JUDGMENT OF THE CIRCUIT COURT OF WYOMING COUNTY HEREIN DOES NOT ESTABLISH ANY PRECEDENT FOR ANY WEST VIRGINIA COURT TO DEPART FROM THE DOCTRINE OF NEW YORK TIMES V SULLIVAN, 376 U. S. 254, OR SUBSEQUENT PERTINENT DECISIONS,

No opinion was written or published by either the Circuit Court of Wyoming County or the West Virginia Supreme Court of Appeals, nor does the judgment order complained of contain any statement of doctrine or any ground for its decision. The case does not pertain to any

other case and the decision is not binding in any other case. *In re Nat. Bank of West Virginia,* 137 W. Va. 673, 73 S. E. (2d) 655.

The Petitioner attempts to demonstrate the importance of the question raised by reference to a recent action against the same Petitioner by the Mayor of Beckley, wherein the complaint is cast in the same general language of common law civil libel heretofore found in the form books. This action is only in the early stages of complaint and answer. It would be, and is, highly presumptuous to conclude from the filing of that suit and from the fact that the face of the complaint is cast in traditional form book language pertaining to civil libel that (a) the *facts* are the same or similar to the instant case, (b) the complaint will not be amended to put the language more in line with the doctrine of *New York Times v Sullivan,* 376 U. S. 254, (c) that the case will be incorrectly tried and an instruction identical to Plaintiff's Instruction No. 3 will be offered by plaintiff and given by the Court, (d) that the trial court will not follow the proper legal rules with reference to "actual malice" where public officials are criticized, (e) that Petitioner's counsel therein will fail to object to specific inclusion of an incorrect definition of malice or will offer similar instructions on Petitioner's behalf, or (f) that the West Virginia Supreme Court of Appeals will wrongly apply the law when grounds of error are properly presented to it.

IV

TO SUSTAIN THE JUDGMENT IN THIS CASE WILL NOT DENY PETITIONER ITS DUTY OR PRIVILEGE OF CRITICIZING RESPONDENT OR OTHER PUBLIC OFFICIALS HEREAFTER.

In this particular case there is no evidence or reason to believe that a judgment of $5,000.00 against Petitioner will drive its papers out of business or restrict its

criticism. Petitioner has filed as Appendix E with the Petition a copy of the complaint in another later action against Petitioner by the Mayor of Beckley. By reference thereto it will be seen Petitioner was not silenced or even discouraged by the verdict herein in May, 1966 or the judgment thereon in June 1966. And Petitioner's general manager in his testimony in this case, long before the Smith case was filed boasted "This isn't the first time we've been sued." (Tr. 117). Nor is there reason to assume a verdict of $5,000.00 will bankrupt the Beckley Newspaper Corporation just because Beckley and vicinity has less population than New York and petitioner's circulation is less than that of the New York Times.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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